

¹ The rate at which these payments is to be made is not disclosed in the Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

By all indications, claimant was injured in a compensable accident in May of 2000 in which he suffered a crush injury to his right foot and ankle. He has received treatment and was ultimately released to return to work with some restrictions which respondent was able to accommodate. That physician, Dr. Dennis A. Estep, further indicated claimant would need ongoing pain medication and medical management for that injury.

The ALJ directed respondent to provide medical treatment through Dr. Howard A. Aks and his referrals but there was some difficulty in getting that treatment arranged. Some of that difficulty may or may not have been caused by claimant as he has recently recognized that he required treatment for what he describes as an over medication of opiates. The medical records indicate something slightly different. They suggest that claimant was demonstrating drug-seeking behavior and that he was, at his own request and that of his family members, placed in an in-patient facility through the Veterans Administration (VA) as of September 17, 2003.

Through his counsel, claimant sought temporary total disability benefits for the period he was in the program at the VA. His testimony was placed into evidence via deposition, without objection, and the medical records relative to his care were submitted to the ALJ at the preliminary hearing. Following receipt of the deposition transcript, the ALJ entered an Order granting claimant's request for temporary total disability benefits for the period September 17, 2003 to December 5, 2003.

Following receipt of that Order, respondent filed a Motion to Modify Award Nunc Pro Tunc, requesting the ALJ to modify the Order. Respondent argued that claimant's own testimony indicated he was released from treatment at the VA on or about October 17, 2003 and therefore, the statute, K.S.A. 44-510c(2) prohibited any award of temporary total disability benefits beyond that date. Respondent maintains that other than claimant's own testimony, there is no evidence within the record that indicates claimant was unable to work due to his industrial injury.

In essence, respondent argues the ALJ exceeded his jurisdiction in awarding benefits for the period October 18, 2003 to December 5, 2003 because claimant was released from the VA program and there is no indication within the medical records that claimant is unable to engage in substantial gainful employment.

The Workers Compensation Act (Act) restricts the Board's jurisdiction to review preliminary hearing findings. Consequently, at this stage of the claim not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in

which an administrative law judge has exceeded his or her jurisdiction.² Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

- (1) did the worker sustain an accidental injury,
- (2) did the injury arise out of and in the course of employment,
- (3) did the worker provide the employer with timely notice and with timely written claim, and
- (4) do certain other defenses apply.

The term “certain defenses” refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.³

The issues of whether a worker needs ongoing medical treatment or whether the worker satisfies the definition of being temporarily and totally disabled are not jurisdictional issues listed in K.S.A. 44-534a that are subject to review from a preliminary hearing order. Conversely, those issues involve questions of law and fact over which an administrative law judge has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

Respondent's argument that the ALJ exceeded his jurisdiction by awarding temporary total disability benefits without appropriate medical evidence is without merit. Temporary total disability benefits can be awarded on a worker's testimony alone.⁵

² K.S.A. 2002 Supp. 44-551(b)(2)(A).

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁵ *See Overstreet v. Mid-West Conveyor Co., Inc.*, 26 Kan. App. 2d 586, 587, 994 P.2d 639 (1999).

This finding is subject to a full presentation of the facts.⁶

WHEREFORE, it is the finding, decision and order of the Board that respondent's appeal of the Order of Administrative Law Judge Jon L. Frobish dated November 3, 2003 is hereby dismissed.

IT IS SO ORDERED.

Dated this _____ day of December, 2003.

BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant
Troy A. Unruh, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁶ K.S.A. 44-534a(b).